IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 11, 2004 Session

IN RE: ESTATE OF MERLE JEFFERS MCFARLAND

Appeal by Permission from the Chancery Court for Hawkins County
No. 3554 Thomas R. Frierson, II, Chancellor

No. E2003-01833-COA-R9-CV - FILED OCTOBER 27, 2004

We granted the application of Stephen D. McFarland ("the Administrator"), the Administrator C.T.A. of the Estate of Merle Jeffers McFarland ("the Testatrix"), for an interlocutory appeal pursuant to Tenn. R. App. P. 9, to answer the question of whether a gift of a percentage of the residuary, which lapses when the beneficiary predeceases the testator,[1] passes to the other residuary beneficiaries or to the testator's heirs at law. The trial court held that, in such a situation, the bequest passes to the heirs at law. We affirm the decision of the trial court and remand for further proceedings.

Tenn. R. App. P. 9 Appeal by Permission; Judgment of the Chancery Court Affirmed; Case Remanded.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and WILLIAM H. INMAN, SR.J., joined.

Charles R. Terry, Morristown, Tennessee, and Douglas T. Jenkins, Rogersville, Tennessee, for the appellant, Stephen D. McFarland, Administrator C.T.A. of the Estate of Merle Jeffers McFarland.

Gene P. Gaby, Greeneville, Tennessee, for the appellee, James Cox.

J. Robert Walker, Knoxville, Tennessee, for the appellee, the University of Tennessee.[2]

OPINION

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[1] When we discuss, in general terms, relevant principles of law, we will use the male designation of "testator." We do so for ease of reference only.

[2] Although the University of Tennessee's status on this appeal is that of an appellee, it supports the Administrator's position that the conclusion reached by the trial court is in error, and that, consequently, the lapsed gifts should be distributed *pro rata* among the remaining residuary beneficiaries.

I.

On November 14, 1994, the Testatrix executed a holographic will. In her will, she provided, in general terms, as follows: that $3,000 be placed into a cemetery fund designated for (1) expenses related to her burial in the Tieke-McCullough Cemetery and (2) the erection of her headstone; that any expenses incurred by her at a hospital or nursing home be paid; and that "[t]he rest of the estate" be divided into percentage shares assigned to a list of ten people and eight entities.[3] Three of the individuals recognized for the Testatrix's largess in the residuary clause – Minnis Rankin Jeffers, Willie Lee Jeffers, and Mary Louise McFarland (collectively, "the deceased beneficiaries") – predeceased the Testatrix. Each of the deceased beneficiaries was to have received ten percent of the Testatrix's estate after the establishment of the cemetery fund and the payment of outstanding hospital and nursing home bills.

The Testatrix died on October 21, 2001. The Administrator was appointed by the trial court, and the will was subsequently admitted to probate. On July 19, 2002, the Administrator filed this suit, being a complaint for declaratory judgment. He seeks direction as to how the gifts to the deceased beneficiaries should be disposed of. Specifically, he asked the trial court to determine whether the shares of the estate bequeathed to the deceased beneficiaries pass to the other residuary beneficiaries *pro rata*, or whether the Testatrix died intestate as to the 30% left to the deceased beneficiaries, thereby requiring that this 30% of the estate would pass to the Testatrix's heirs at law. The Administrator argues for the former position.

The trial court memorialized its decision in a memorandum opinion filed January 16, 2003. The court held that the lapsed gifts should be treated as if the Testatrix died intestate as to that portion of her estate. Consequently, the trial court held that 30% of the residuary estate would pass to the Testatrix's heirs at law rather than *pro rata* to the other beneficiaries named in the residuary clause. The trial court entered an order to this effect on April 8, 2003, and the Administrator was instructed to ascertain the identity of the Testatrix's heirs at law for distribution of the lapsed gifts.

The Administrator sought permission from the trial court to file an interlocutory appeal pursuant to Tenn. R. App. P. 9[4]. On July 8, 2003, the trial court entered an order granting the motion and certified the issue of "whether the [c]ourt erred in concluding that thirty (30%) percent of the

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[3]The entities were the First United Methodist Church of Bulls Gap; the City of Bulls Gap; Tieke-McCullough Cemetery, for upkeep of the cemetery; Thompson Cancer Center; the University of Tennessee; the Masonic Lodge; the Eastern Star Lodge; and the United Way or "any worthy [c]harity [f]und."

[4]Tenn. R. App. P. 9(a) provides, in relevant part, as follows:

> [A]n appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court.

estate should be distributed to the heirs at law of [the Testatrix]."[5] We granted the Administrator's application for an interlocutory appeal. We also granted the motion of the University of Tennessee ("the University"), as a named beneficiary in the residuary clause, to file a memorandum in support of the Administrator's position on this appeal.

II.

The singular issue in this case is whether, as held by the trial court, the remaining 30% of the residuary, which was bequeathed to the deceased beneficiaries, should be treated as if the Testatrix died intestate as to this portion of the residuary such that the 30% would pass to the Testatrix's heirs at law. As this presents only a question of law, our review is taken "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower court[]." ***S. Constructors, Inc. v. Loudon County Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001).

The "cardinal rule" regarding the construction of a will is that the court shall "seek to discover the intention of the testator and give effect to it unless it contravenes some rule of law or public policy." ***Presley v. Hanks***, 782 S.W.2d 482, 487 (Tenn. Ct. App. 1989). The intention is to be "ascertained from the particular words used in the will itself, from the context in which those words are used, and from the general scope and purposes of the will, read in the light of the surrounding and attending circumstances." ***Id.*** There is a common law presumption, codified in Tenn. Code Ann. § 32-3-101 (2001)[6], that a person who creates a will does not intend to die intestate. ***See In re Walker***, 849 S.W.2d 766, 768 (Tenn. 1993). Yet, that presumption is only "applicable when the words used, by any fair interpretation, will embrace the property not otherwise devised, unless a contrary intention appears from the context." ***Id.*** (quoting ***McDonald v. Ledford***, 205 S.W. 312, 313 (Tenn. 1917)). Therefore, a court should look at "that which [the testator] has written in the will" and not what the testator "may be supposed to have intended to do." ***Id.*** (quoting ***Nichols v. Todd***, 101 S.W.2d 486, 490 (Tenn. Ct. App. 1936)) (internal quotation marks omitted). As an additional consideration, where a will is drafted, as in the instant case, by the testator, and the testator was neither well-versed in the law nor acting with legal assistance, the court should construe the language of the instrument liberally so as to discern the testamentary purpose. ***Davis v. Anthony***, 384 S.W.2d 60, 62 (Tenn. Ct. App. 1964). It is with these principles in mind that we turn to the narrow issue of law before us.

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[5] In this order, the trial court also directed the Administrator to distribute the remaining seventy (70%) percent of the estate, retaining funds not less than the total of (1) 30% of the estate, (2) the estimated expenses of administration, (3) any obligations stemming from taxes, costs and litigation expenses, and (4) any other debts of the estate.

[6] Tenn. Code Ann. § 32-3-101 provides as follows:

> A will shall be construed, in reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, and shall convey all the real estate belonging to the testator, or in which the testator had any interest at the testator's decease, unless a contrary intention appear by its words in context.

III.

Common law dictates that a legacy lapses when a devisee or legatee dies during the lifetime of the testator, as is the case before us.[7] ***Dixon v. Cooper***, 12 S.W. 445, 446 (Tenn. 1889). The general proposition is that when a specific legacy or devise lapses, the bequest passes under the residuary clause in the will. ***Milligan v. Greeneville College***, 2 S.W.2d 90, 93 (Tenn. 1928). However, this law takes a peculiar twist when that legacy or devise is not a specific bequest, but rather is one set forth in the residuary clause. This latter situation was first addressed in the case of ***Ford v. Ford***, 31 Tenn. 431 (Tenn. 1852). ***Ford*** was followed in a subsequent case in which the rule was stated as follows:

> [W]here the gift which fails of consummation is within the terms of the residuary clause, in the absence of statute or some other provision of the will, it can not be divided among the other residuary beneficiaries but goes to the heirs at law of the testator.

Davis, 384 S.W.2d at 63 (Tenn. Ct. App. 1964).

These divergent principles, and the manner in which they are applied, are clearly illustrated in the ***Davis*** case. In that case, the testator's will contained two provisions relevant to the court's analysis: first, a provision leaving the testator's wife 50% of his estate,[8] and another provision setting forth a list of named beneficiaries to whom the testator devised "the remaining fifty percent of [his] estate." ***Davis,*** 384 S.W.2d at 61. As the wife died simultaneously with the testator, the court held, pursuant to the rule that a residuary clause disposes of lapsed or void legacies, that the testator's bequest to his wife passed to the beneficiaries in the residuary clause. ***Id.*** at 63 (citing ***Milligan***, 2

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[7]The "anti-lapse" statute, codified in Tenn. Code Ann. § 32-3-105 (2001), prevents, under certain circumstances, a gift from lapsing when the devisee or legatee predeceases the testator. The statute provides as follows:

> Whenever the devisee or legatee or any member of a class to which an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, *leaving issue which survives the testator*, the issue shall take the estate or interest devised or bequeathed which the devisee or legatee or the member of the class, as the case may be, would have taken, had that person survived the testator, unless a different disposition thereof is made or required by the will.

Tenn. Code. Ann § 32-3-105(a) (emphasis added). "Issue" contemplates direct descendants of the deceased devisee or legatee. ***See White v. Kane***, 159 S.W.2d 92, 94 (Tenn. 1942). Since the deceased beneficiaries in the instant case left no such issue, the trial court found that the common law governs and the anti-lapse statute is not implicated. The parties do not contest the trial court's holding on this point.

[8]The will provided, in relevant part, that "I hereby will, devise, and bequeath fifty percent of all the rest, residue and remainder of my estate..." ***Davis***, 384 S.W.2d at 61. Although the language employed – "all the rest, residue and remainder" – is sometimes used to signal a residuary clause, the court in the cited case interpreted it to simply mean that the testator's wife would receive fifty percent of the estate after the payment of debts and funeral expenses. ***Id.*** at 63.

S.W.2d at 93). However, as to one of the beneficiaries contained in the residuary clause who predeceased the testator, his gift passed to the testator's heirs at law. ***Id.*** Similarly, upon finding in the instant case that the deceased beneficiaries' bequest was contained in a residuary clause, as evinced by the language, "the rest of the estate I wish to be divided to the following," the trial court applied the rule set forth in ***Davis*** to hold the following:

> [The Testatrix] intended to bequeath portions of her estate to [the deceased beneficiaries] as components of her residual estate. With respect to the lapsed legacies relating to [the deceased beneficiaries], as these gifts failed of consummation under the terms of [the Testatrix]'s residuary clause, there being no other provision of the will to the contrary, the portion of [the Testatrix]'s estate relating to such lapsed legacies must be divided among her heirs at law and not the remaining residuary beneficiaries.

We concur with the trial court's decision. First, the language employed – "the rest of the estate" – signals a residuary clause. Courts have found residuary clauses where similar language was employed. ***See id.*** at 61, 62 (a phrase such as "the remain[der] of my estate" would constitute a "true residuary clause" even in light of the liberal construction afforded to a will drafted by the testator himself). Therefore, since the gifts to the deceased beneficiaries are clearly contained in the residuary clause, we adhere to the clear precedent set forth in the ***Davis*** and ***Ford*** decisions that, where a bequest in the residuary clause lapses when, for instance, the beneficiary predeceases the testator, that bequest passes to the testator's heirs at law and not to the other residuary beneficiaries.

The Administrator and the University attempt to impress upon us the court's obligation to discern the intent of the testator, as they contend intent controls and should not be defeated by the holdings of ***Davis*** and ***Ford***. As they argue, since the will as written contains a carefully selected list of people and entities who were to receive portions of the Testatrix's estate, it follows that she did not desire for her heirs at law to inherit anything. They urge us to disregard the holdings of ***Davis*** and ***Ford*** and instead find that the Testatrix clearly intended that only those enumerated in the will would receive a portion of her estate. Consequently, so their argument goes, her failure to account for the deaths of the three beneficiaries with an alternative disposition demonstrates that she believed the assets would be divided equally among the other beneficiaries.

As further support for this argument, the Administrator and the University seek to distinguish the ***Ford*** and ***Davis*** cases, arguing that they applied the rule mechanically and, particularly with respect to the ***Davis*** case, failed to contemplate the testator's intent. The Administrator and the University direct us to the ***Ford*** court's discussion of the testator's intent in support of their argument that the result in that case was based upon an analysis of the testator's intent and not on the subject rule.

The ***Ford*** case concerns a revocation of a bequest by codicil; the testator had provided in his will that his property "not heretofore devised" elsewhere in the will would pass equally to his six children. ***Ford***, 31 Tenn. at 433. However, when one of the daughters married against his wishes, he included a codicil that revoked her legacy. ***Id.*** The court held that the portion of the estate assigned to that daughter lapsed, and, consequently, her legacy passed to the testator's heirs at law and not to the other children contained in the residuary clause. ***Id.*** at 436. The court noted that upon revoking one child's legacy, it would be reasonable to suppose that if the testator wanted to enlarge the legacies of the other five children, he would have done so; for, as the court stated, "it is difficult to see how the five children could have higher claims upon the bounty of the testator than his remaining child." ***Id.*** However, despite this discussion of intent, it does not appear to be the basis of the ***Ford*** court's decision. The court in ***Ford*** noted that "[b]e that, however, as it may, it is very clear that the share of [the daughter] is not disposed of by the will, and that it goes to the next of kin, as in case of intestacy," for this is commensurate with the "well-settled rules of construction" that provide that where "a bequest to several be of the residue, and it fail as to part by reason of lapse...such part cannot fall into the remaining residue, but will be undisposed of and go to the next of kin." ***Id.*** at 435, 436.

The ***Davis*** court did not discuss the testator's intention regarding the disposal of the deceased beneficiary's bequest. The rule followed by that court is well established in the jurisprudence of this state, as well as in other jurisdictions.[9] We hold that the court in the instant case followed controlling precedent. Without explicit language providing an alternative method for disposing of the deceased beneficiaries' gifts, the precedent before us is clear: a lapsed legacy contained in a residuary clause passes to the testator's heirs at law. ***Ford***, 31 Tenn. at 435. The fact that the court in ***Ford*** found further support for its decision by looking to the testator's intent does not change the fact that it relied upon a well-settled rule of law.

As an alternative, the University suggests that we abrogate the holdings of the ***Davis*** and ***Ford*** courts. It argues that the rule pronounced in those cases does not represent the prevailing view in modern American jurisprudence. Instead, the University directs us to the treatise cited by the

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[9] A recent A.L.R. annotation defines the majority rule as follows:

> It would seem to be a not unreasonable view that, prima facie, by a gift of all his residuary property to designated persons a testator intends that whatever assets happen to fall within the provision shall go to those persons as being the ones preferred by him in any event as against the whole world. Nevertheless, . . . the rule which prevails in most jurisdictions, in the absence of statute or distinctly disclosed intention or justified construction of the will to the contrary, is that if the instrument disposes of residuary property or funds to two or more persons and one or some of them...predecease the testator...the shares affected do not inure to the other reisduary beneficiaries in augmentation of their shares but on the contrary pass as in case of intestacy.

W. W. Allen, Annotation, *Devolution of Lapsed Portion of a Residuary Estate*, 36 A.L.R.2d 1117, § 2[a] (2004).

court in ***Davis*** and its comparable provision today.[10] Regardless of how we might be persuaded by this argument, we are confined to the precedent before us. Supreme Court Rule 4 provides that "[o]pinions reported in the official reporter, . . ., shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction." Sup. Ct. R. 4(H)(2). We find that the holding of ***Ford*** and its subsequent application in ***Davis*** is well-established, controlling authority and consequently we decline to revisit the holdings of those courts. ***Ford*** represents a proper interpretation of the rule, which has not been altered in any way by subsequent legislation, and, although the Administrator contends that this is a rarely-cited rule, he does not cite any Tennessee authority abrogating the rule. Any policy arguments relative to changing the rule that lapsed legacies contained in a residual clause pass to the heirs at law are more appropriately addressed to the legislative branch, *see* ***Jones v. Crumley***, No. E2003-01598-COA-R3-CV, 2004 WL 2086330, at * 2 (Tenn. Ct. App. E.S., filed June 7, 2004), or the Supreme Court.

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[10] In addition to citing the rule set forth in ***Ford***, the ***Davis*** court made note of a provision of American Jurisprudence in support of its holding that a lapsed gift to a residuary beneficiary should be distributed to the testator's heirs at law. ***Davis***, 384 S.W.2d at 63. That provision provides, in relevant part, as follows:

> It is, of course, clear that if a residuary gift to a single beneficiary lapses or becomes ineffective, the subject matter thereof will pass to the testator's heirs as intestate property, and in most cases under a residuary gift to several persons nominatim, or in common, and not as a class, a lapsed portion of the residuary devise or legacy does not, in the absence of statute, inure to the benefit of the other residuary devisees or legatees, unless the intention of the testator to that effect clearly appears; . . .

57 Am.Jur. Wills § 1453 (1948) (citations omitted). However, the University directs our attention to another portion of this provision, which reads, in relevant part, as follows:

> The principle [that a lapsed portion of the residuary passes by intestacy] has evoked considerable dissatisfaction, even among those courts which recognize and follow it, and in a few jurisdictions it has been changed by statute. Some courts, in the absence of any statutory change, have refused to accept the rule and, instead, have adopted the view that in the circumstances outlined, the lapsed portion of the residuary gift must be held to pass to the surviving residuary donees.

Id. (citations omitted). To demonstrate the subsequent changes in the law, the University cites the comparable provision in the most recent volume of Am.Jur.2d, which provides as follows:

> If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue. Thus, when a bequest to a residuary legatee lapses, his interest passes to the other residuary legatees in proportion to their interests.

80 Am.Jur.2d Wills § 1452 (2002)(citations omitted). Although other courts may be modifying their treatment of this issue, we decline to do so for the reasons articulated herein.

IV.

The judgment of the trial court is affirmed. This case is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are taxed to the Administrator.

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CHARLES D. SUSANO, JR., JUDGE